United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2122

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2122

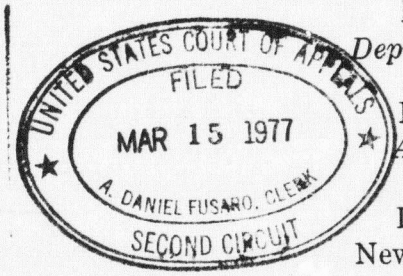
PAUL MOYNAHAN,
Plaintiff-Appellee,

—vs.—

JOHN R. MANSON, Commissioner of Corrections
of the State of Connecticut,
Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, GRANTING PETITION FOR A WRIT OF HABEAS CORPUS

DEFENDANT'S-APPELLANT'S BRIEF



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Statement of Issues

I. Did the District Court err in holding that the appellee's right of confrontation under the Sixth and Fourteenth Amendments was abridged by the limitation of the cross-examination of a prosecution witness?

A. The *Davis* v. *Alaska* claim: Did the conduct of the trial judge deprive appellant of his constitutional right to confrontation?

B. Was appellee denied a federal right by the trial court's refusal to permit him to call Stevens and Gaspari to testify concerning purchases from Edward Miller?

C. Did appellee intentionally and voluntarily abandon the line of inquiry he now asserts he was not permitted to develop in his cross-examination of Edward Miller?

D. Should *Davis* v. *Alaska* be applied retrospectively?

II. Did the District Court err in holding that the state trial court violated *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny by failing to disclose to the defense information indicating, according to the court, that the police were at one time considering arresting a witness?

III. Did the District Court err in holding that the state trial court denied the appellee his right to confrontation by allowing a witness to take the stand who reportedly might take the Fifth Amendment and who in fact did?

Statement of the Case

In the state case underlying the federal habeas corpus action, appellee was convicted of the crime of receiving stolen goods in violation of the then operative §§53-63 and 53-65 of the Connecticut General Statutes. On March 4, 1970, appellee, the deputy police superintendent of the Waterbury, Connecticut Police Department, was sentenced by the Connecticut Superior Court. In a 43 page decision announced on April 5, 1973, the Connecticut Supreme Court affirmed the conviction. 164 Conn. 560. After several actions concerning post-conviction relief in the state courts, appellee instituted the present action in the United States District Court for the District of Connecticut in November, 1973. (Document No. 1).[1] The District Court granted the requested relief in a memorandum of decision filed on August 31, 1976 (A. 316),[2] and judgment filed on September 3, 1976. (Document No. 16). From this decision the defendant-appellant Commissioner of Corrections appeals to this court.

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[1] References are to Items in Index to Record on Appeal.

[2] References are to Joint Appendix.

A summary of the course of the trial may be helpful. John Bishop, who was in jail awaiting sentencing on a charge of conspiracy to commit larceny and who had a record of other felony convictions, testified that on April 8, 1967, he broke into an appliance store in West Haven, Connecticut and took at least one television set. (Exhibit 4(a) pp. 29-30, 41-52).[3] He went directly to the home of Charles Vernale, who "fenced" goods for him, and put the television in issue in Vernale's garage. (Exhibit 4(a) pp. 54, 58). He returned a week later for payment; at that time he and Vernale delivered the set to the home of the defendant Paul Moynahan; he testified that this set was the one he had stolen. (Exhibit 4(a) pp. 63-65). Bishop had previously seen the defendant at Vernale's house; the defendant had said that he didn't care what Bishop and Vernale did so long as they didn't do anything in Waterbury. (Exhibit 4(a) pp. 71, 75). Bishop testified that he had been told that the sentencing judge in his criminal case would be made aware of his testimony. (Exhibit 4(a), p. 81).

During cross-examination, copies of Bishop's statements to the police and to the investigative grand jury were ordered to be delivered to the defendant. (Exhibit 4(a), pp. 106-07, 121). All of the prior statements of John Bishop were turned over to the defendant and, along with other documents, appear in the record before this court as "Defendant's Exhibit 23 for I.D. only." For the sake of brevity, the appellant will henceforth refer to this packet of documents as "Exhibit 23."[4]

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[3] References are to Exhibits included in Document # 21 in Index to Record on Appeal which are set forth in Designation of Contents of Appendix.

[4] The record before the District Court is somewhat confusing. There were two large envelopes containing material which had been considered by the District Court but had not been entered as exhibits in that court. One envelope, marked in the state

[Footnote continued on following page]

There then was testimony to the effect that a smashed television set had been found in Plymouth, Connecticut on March 27, 1969. (Exhibit 4(b), p. 266). Evidence of a repair was found. (Exhibit 4(b) p. 325).

Edward Miller, a television repairman, testified that he repaired a set at the defendant's home on a Sunday in the summer of 1967. He described the repair work. (A. 108-110). Miller had described the work to the police in February, 1969, and didn't see the set between 1967 and March, 1969. (A. 123-124).

In March, Miller viewed the smashed set which had been found and verified that the repair was his. (A. 126). The entire direct examination consumed only twenty transcript pages. (A. 108-129).

On cross-examination, the defendant moved for the production of all statements and grand jury testimony of Miller. (A. 131). At this point rather extensive arguments occurred in the absence of the jury; a detailed discussion of the issues will appear in the Argument section of this brief. Extensive cross-examination was conducted; again, detailed comment will be made later.

Miller's testimony concerning the identification of the repair was corroborated by a policeman, J. Joseph Smith, Jr. (Exhibit 7).

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court as "Defendant's Exhibit 23 for I.D. only," contained statements or portions thereof which were disclosed by the state to the defendant at trial. The other, marked "Defendant's Exhibit 24 for I.D. only," contained the entirety of those statements in Exhibit 23 which had been edited prior to disclosure. On learning of this situation, the appellant moved that the two envelopes be included in the record before this court. Appellant's motion was granted by Judge Blumenfeld on November 1, 1976. (See Document No. 22).

Charles Vernale was called to the stand by the state, initially in the absence of the jury. The state urged that the court call Vernale as the court's witness, because Vernale had given conflicting statements. The issue of whether Vernale would invoke the Fifth Amendment was discussed; this issue will be discussed at greater length. (Exhibit 3, pp. 804-817).

In the presence of the jury, Vernale testified that he was presently incarcerated and that he knew and had been friendly with the defendant. (Exhibit 3, pp. 819-20). Vernale then invoked the Fifth Amendment to several other questions. (Exhibit 3, pp. 820-21).

Prior to cross-examination, the defendant moved for all statements and prior testimony of Charles Vernale. All such material which related to the defendant was ordered to be turned over to the defense. (Exhibit 3, pp. 825-832). On the next following court day, Vernale testified about some matters and invoked the Fifth Amendment on others. (A. 267-270).

Other witnesses testified for the state and a lengthy defense was conducted. This other testimony, however, does not appear in the record before this court and did not contribute to Judge Blumenfeld's decision.

During the course of the argument to the jury, the state suggested that Miller was credible because he had accurately predicted the nature of the repair on the television set. (A. 276). In his argument, the defendant attacked Miller's credibility by saying that Miller had bought television sets from Vernale and had no records concerning those television sets. (A. 282). In rebuttal, the state mentioned in passing that Vernale had taken the Fifth Amendment and added that Miller had no "axe to grind" and again mentioned Miller's prediction. (A. 289-290).

Further discussion of the general factual background appears in the Connecticut Supreme Court opinion at 164 Conn. 560, 571-74.

ARGUMENT

POINT I

Appellee's right to confrontation under the Sixth and Fourteenth Amendments was not abridged by the State trial judge's limitation of the cross-examination of a prosecution witness.

The Sixth Amendment guarantees the right of a defendant in a criminal case "to be confronted with the witnesses against him" and this basic right is secured for defendants in state prosecutions through the Fourteenth Amendment. *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965). Quite obviously, the very essence of the right protected by the confrontation clause is the right to adequately and effectively cross-examine prosecution witnesses. *Smith* v. *Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed. 2d 956 (1968); *Brookhart* v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed. 2d 314 (1966); *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965). Included in the constitutionally protected right of confrontation is the cross-examiner's entitlement to expose bias, prejudice, and/or improper motivation on the part of a given prosecution witness since such considerations are relevant in weighing the credibility of the witness's testimony. *Davis* v. *Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974); *Green* v. *McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959); *Alford* v. *United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

Here, the District Court held that the state trial judge unconstitutionally denied appellee the opportunity to develop during cross-examination possible criminal involvement of a prosecution witness, Edward Miller. It is submitted that a fair review of Miller's testimony reveals that the trial judge permitted extraordinary latitude in the cross-examination of this witness and allowed very extensive questioning concerning the witness' relationship with others (Bishop and Vernale) directly involved in the stealing and receipt of stolen goods. The state trial court, in the exercise of its traditional discretion, restricted Miller's cross-examination only where the defense inquiries related to matters clearly collateral to the transaction which was the subject-matter of the prosecution; to have allowed such prolonged cross-examination would have required litigation of the circumstances of collateral incidents which had little or no bearing on the reliability of Miller's testimony.

On direct, Miller testified that he had been employed for seventeen years as a television repairman and, on a summer Sunday morning in 1967, had repaired a Motorola 23 inch color T.V. set (Early American cabinet, maple finish) in the front sunroom of appellee's home. This witness described the nature of the repair in great detail: he repaired the set by opening a metal box in the chassis, removing the coil, soldering the broken wire, covering the wire with electrical tape to hold it in place and finishing the repair by soldering the metal box. The witness identified appellee as being present at the time he repaired the T.V. set. According to Miller, upon completion of the repair, appellee examined the set, expressed satisfaction, and paid the witness a fifteen dollar repair fee. (A. 108-117, 122-123).

Miller further testified that on three dates in February of 1969, he was interviewed by the Connecticut State Police regarding the repair he had made in 1967

at appellee's home. He told the officers that the set he repaired was a Motorola 23 inch color set, Early American cabinet, maple finish. He described for the police the the full details of the repair stating how he had removed the metal cover of the interior box, soldered the wires of the coil, taped the wires, and then re-soldered the cover of the metal box in place. (A. 118, 123-126).

Miller testified that in April of 1969, the State Police took him to the Town Garage in Plymouth to examine a damaged T.V. set; he examined the set and told the officers it was the same set he had repaired at appellee's home in 1967. Miller informed the police that if they opened the soldered metal box, they would find the wire in the coil soldered and the black plastic tape he had used to cover the soldered wire. Miller testified he was present when the authorities removed the metal cover and he observed the wire in the coil which he had soldered and the black plastic tape which he had told the police would be visible on the interior coil. (A. 125-126).

At the commencement of cross-examination, appellee's counsel established that Miller had given three transcribed statements to the State Police (Feb. 17, 18, and 21, 1969), and that he had testified before the one-man Grand Jury. Thereafter, in the absence of the jury, the trial court inquired as to the scope of appellee's cross-examination to which defense counsel responded: "We would seek to cross-examine Mr. Miller to establish a fixed motive in his mind which would be indicative of untruthfulness." (A. 129-130, 133, 412). The jury was recalled and cross-examination resumed with Miller stating that, prior to going to appellee's home, he had repaired other Motorola sets in 1967 and that his store also sold them. (A. 153-155).

On continued cross-examination, Miller testified as follows: he understood appellee had called him to make the repair since appellee's regular repairman was unavailable on Sunday; this was the only occasion on which Miller ever repaired any T.V. set in appellee's home; Miller had met appellee once before at the home of Charles Vernale who was a customer of Miller's store. (A. 156). When Miller was asked if Vernale was a customer in 1967, the jury was excused so the State's objection to this line of inquiry could be considered by the court. Appellee argued that his purpose in developing cross-examination "along these lines is merely for the purpose of possible erroneous identification or exposure to the set at other places." Defense counsel further stated: "In other words, if he [Miller] were having transactions with Mr. Vernale with respect to repair work or, frankly, . . . acquisition of sets, from him, this raises in my mind that we are placing the man in a position where the man has had business dealings with the man whom the State, through its witness, has identified as being a person who had possession of this set." Thereafter, the following colloquy occurred between the Court and the prosecutor:

> Mr. Gaffney: Now, Mr. Hennessey says this is the line of questioning that he wants to get here. Why doesn't he get this right away? He can just ask the man: Did you ever repair this set at Mr. Vernale's house? It is that simple.
>
> The Court: Mr. Gaffney, he has a right, as counsel, as you well know, to develop testimony in his own way. The Court has no right to restrict him unreasonably, so that I will allow these questions.
>
> * * * * *
>
> The Court: Gentlemen, I would ask you this, to bear in mind the fact that we do have to discuss

these matters in the absence of the jury. In the interest of saving time, and I believe both of you are experienced trial counsel and know the rules of evidence, and I ask you to adhere to the rules so that it will not be necessary to continuously excuse the jury.

However, I am not going to unduly restrict either one of you. I believe that these are questions which are proper on cross-examination, and I will allow them.

Mr. Gaffney: May I have an exception?

The Court: Exception may be noted.

The Court: We will take the morning recess at this time. (A. 156-161).

When the jury returned, Miller was permitted to testify, over the State's objection to each question, as follows: he went to Vernale's house about three times in 1967, once to repair an antenna, one to repair a radio and phonograph, and once to repair a 21 inch Zenith console; in 1967, at Vernale's request, he repaired two other color T.V.s, a Magnavox and an Admiral. After 1967, Miller testified he did not see Vernale very much: "I hadn't seen him at all after that period of time." (A. 160-167). Defense counsel next asked: "Now, during the period of 1967, did you sell any color television sets which you obtained from Mr. Vernale?" The State again objected and the following appears on the record:

The Court: What is the purpose of this question, Mr. Hennessey?

Mr. Hennessey: I am seeking to determine whether or not a mistake might not have occurred, that could it not have been possible for this gentleman to have obtained a set which he resold which

might have been this set which the State has sought to place in Mr. Vernale's possession.

The Court: The objection is overruled. An exception may be noted. (A. 168).

The witness answered the question in the affirmative; when asked how many sets, the trial court again overruled the State's objection and Miller answered: "There were two." (A. 169). Next, the defense inquired as to the identity of persons to whom the two sets were sold; when the State objected, the court stated: "This is cross-examination. Proper latitude is allowable. I will allow it." (A. 170). Miiller testified the two sets were sold to a Mr. Stevens and a Mr. Gasparri. Appellee then asked the witness whether, in 1968, he had sold any color televisions sets obtained from Vernale; Miller answered "No." (A. 171). Appellee then inquired: "Do you have in your records any documents relating to the purchase of those color television sets?" The State objected and the following transpired:

The Court: What is the purpose of this question, Mr. Hennessey?

Mr. Hennessey: Well, I am seeking to determine again, your Honor, whether or not this man may have other documents or information in his possession which would be of assistance to me with respect to the question of identification.

Mr. Gaffney: Identification of what, this particular set? I don't follow his reasoning, your Honor. We have talked about all the other sets except this particular set.

Mr. Hennessey: Could I be heard on that, if your Honor pleases?

On repeated occasions Mr. Gaffney has sought to limit me to this set. I think it is obvious, your

Honor, what our defense is, and I don't think that our case rests solely on this set.

Mr. Gaffney: If the Court please, the defendant's case is not before the Court. The State's case is before the Court, and the State's case is based on this set and this man has testified as a State's witness on direct examination. His examination was limited to this particular set, and I submit it should be limited to that scope.

The Court: I think the last question is remote, Mr. Hennessey. I will sustain the objection to the last question. (A. 172-174).

Miller's brief direct examination was conducted during the course of the court day on January 20, 1970; it consumed only twenty-two pages (22) of transcript. Cross-examination of Miller commenced January 20, 1970 and continued through January 21st; cross-examination of this witness consummed one hundred eighty-seven pages (187) of transcript. During that morning of January 21, Miller was further cross-examined in great detail and at great length concerning the nature of the repair he performed at appellee's home and claimed inconsistencies between his testimony and prior statements to the police. When the Court recessed at 1:00 P.M. for lunch, Miller was still being cross-examined; prior to recalling him to the stand when court reconvened after lunch, defense counsel advised the court: "we are going to bring Mr. Miller back and I hopefully request that I be able to ask those questions in the absence of the jury which may cause some concern." The court agreed to the so called "dry run" and, in the absence of the jury, the judge overruled the State's objections to all but three of the questions. (Entire "dry run" is set forth in entirety, A. 214-226).

In the absence of the jury, Miller testified that when he received the two television sets from Vernale which he subsequently sold to Gaspari and Stevens, he did not know they were stolen; that when he was first questioned by the police he was not told he was under investigation for anything; that no one made any promise to him as to what might occur if he testified; that there were no conversations about promises; that at no itme was he apprehensive about the questioning; that he told the police he would be willing to cooperate; that he was questioned about the Petitioner's transaction and several others; that at no time during these questionings was there any suggestion that he was under investigation; that in his own mind he did not think he was under investigation; that no one ever said or suggested to him what would happen if he did not cooperate; that no promises or threats were made to him about the Lanza, Griffin, Stevens, Gaspari or MacIntosh matters, nor, at any time did he feel that he was under investigation for any of these; that he kept no books or records of those transactions. (A. 214-224).

The trial court sustained the State's objection to the following questions: "At any subsequent inquiry were you told by any member of the police or any member of the State's Attorney's office that you were under investigation?"; "How much was paid to Vernale for the two sets?"; "Whether he received invoices when he received the sets from Vernale?" (A. 223-224).

After the completion of the "dry-run," appellee requested that the foregoing line of inquiry be considered as an offer of proof. The court suggested that the best way to handle it would be to have the reporter read the questions and answers to the jury rather than have Petitioner's counsel repeat them. At this point, the Petitioner's attorney said "Well, I didn't want to ask the questions

in their presence." The court then further suggested that those questions to which objections had been sustained be omitted from the reporter's reading. The State objected to the idea of a non-adversary interrogation before the jury whereupon the appellee's attorney announced "I won't go into this line of inquiry at all." To this, the trial judge replied: "Then that solves the whole problem." (A. 224-226).

When the jury returned, appellee continued and, subsequently, completed his cross-examination of Miller. At no time were any other questions asked of this witness as to any bias or prejudice against the appellee or whether any improper design or motive existed for his testimony.

A. The *Davis* v. *Alaska Claim:* The conduct of the trial judge did not deprive appellant of his constitutional right to confrontation

Approximately six and one-half years after appellee's conviction, over three and one-half years after the affirmance of that conviction by the Connecticut Supreme Court, and almost three years after the filing of this federal habeas petition, the District Court filed its Memorandum of Decision holding that the efforts of an experienced state trial judge in conducting an orderly trial abridged a federal right. The District Court premised this conclusion on its interpretation of the scope of the constitutional mandate enunciated in *Davis* v. *Alaska*, *supra*, decided while this petition for habeas relief was pending.

In *Davis*, a "crucial" prosecution witness (person who identified the defendant) was on probation as a result of a juvenile court adjudication; under Alaska law, such probationary status was entitled to complete confidentiality and, although readily known about by defense counsel,

could not be revealed through cross-examination. Following affirmance of Davis' conviction by the Alaska Supreme Court, certiorari was granted by the United States Supreme Court to consider:

> whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross examination directed at possible bias deriving from the witness' probationary status as a juvenile delinquent when such impeachment would conflict with the State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency. *Davis* v. *Alaska*, 415 U.S., *supra* at p. 309.

The Supreme Court reversed the Alaska court stating: "*In this setting* we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness and his family] by disclosure of his juvenile record . . . is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." (Emphasis added). *Davis* v. *Alaska*, 415 U.S. *supra* at p. 319. In a separate opinion, Mr. Justice Stewart concurred with the majority holding "in the circumstances of this case." *Davis* v. *Alaska*, 415 U.S. *supra* at p. 321.

More specifically, Davis had been convicted of grand larceny and burglary in regards to the theft of a two foot square safe from a bar known as the Polar Bar in Anchorage. Richard Green was the crucial witness for the prosecution. He had a juvenile record stemming from the burglary of two cabins and at the time of Davis' trial was on probation. A protective order was entered prior to the testimony prohibiting any reference to Green's juvenile record by the defense in the course of cross-examination. Chief Justice Burger's opinion, quoting

from the trial transcript a portion of Green's cross-examination, emphasized the fact that the protective order effectively left unchallengeable Green's "protestations of unconcern over possible police suspicion that he might have had a part in the Polar Bar burglary and his categorial denial of ever having been the subject of any similar law-enforcement interrogations." Citing the fact that the confrontation clause includes the right to a *meaningful* cross-examination, the Court concluded:

> As in Alford, we conclude that the State's desire that Green fulfill his public duty to testify freely from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself. *Davis* v. *Alaska*, 415 U.S., *supra* at p. 320.

The tenor of the *Davis* decision is a balancing of the state's desire to maintain the secrecy of juvenile records and the right of a defendant to effectively confront and cross-examine the key witness against him. The Court struck the balance at a point where the witness was permitted to use the protective order to commit perjury. Cf. *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971). Here, the District Court's unwarranted and very expansive interpretation of the constitutional rule established by *Davis* merely amounts to another extraordinary example of an experienced state trial judge being "second-guessed" by a federal court on routine evidentiary rulings made many years before during the course of state criminal litigation.

The right to cross-examine for purposes of establishing witness bias, prejudice, special interest, and/or improper motive is well-established in Connecticut law. *State* v. *Luzzi*, 147 Conn. 40 (1959); *Atwood* v. *Welton*, 7 Conn. 66 (1828). Similarly, it has long been recognized that the scope of cross-examination is matter

properly and necessarily within the sound discretion of the trial judge and rulings in this regard are to be overturned only upon a clear showing of abuse. *State* v. *Luzzi*, *supra*. This court, in rejecting a *Davis* claim (on direct review), has also reiterated these basic and established rules of evidence: "The extent of cross-examination of a witness is normally resolved by the trial judge in the reasoned exercise of his discretion." *United States* v. *Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975). In the instant case, by granting the writ, the District Court determined, *on this record*, that the state trial judge not only abused his discretion, but that such abuse was of constitutional magnitude. Appellant contends that this conclusion finds no support in either the record or in existing legal precedent.

Here, appellee was permitted to cross-examine Miller about repairs he had made at the request of Vernale, about his business relationship (in 1967) with Vernale, and about the two sets he had obtained from Vernale and later sold. Thus, the trial, judge, over the State's objections, permitted cross-examination into the witness' business dealings with Vernale, and, to the extent that these demonstrated questionable motivation deriving from possible criminal complicity, the details were fully before the jury. Additionally, had appellee so chosen, he could have asked those "dry-run" questions to which objections were not sustained when the jury returned.[5] His reason

[5] The record clearly reveals that the trial judge never entered a ruling excluding those "dry-run" questions on which the State's objection had been overruled. Appellee's attorney specifically stated he "didn't want to ask the questions in their [the jury's] presence." (A. 225). The final objection of the State appears to relate to the *reading* of questions and answers to the jury; that is, a non-adversary presentation. Thus, it certainly appears appellee would have been permitted to ask the questions in the presence of the jury if he had desired to do so. Clearly, there was no clear cut ruling excluding this examination as in *Snyder* v. *Coiner*, 510 F.2d 224, 225 (4th Cir. 1975).

for not choosing to do so is apparent on the basis of the answers he received to those questions when they were propounded outside the jury's presence. Only when the cross-examination became clearly repetitious (were you told that you were under investigation?—witness had already testified that he did not believe he was under investigation) and far afield (what he paid Vernale for the two sets, and, whether he had invoices from Vernale) did the trial judge sustain the State's objections to this line of cross-examination.

Clearly, the Confrontation Clause cases emanating from the Supreme Court have found no constitutional deprivation on a record such as this one. In *Alford* v. *United States*, *supra*, the deprivation of the federal right occurred because the trial judge had sustained objections to questions by the defense seeking to elicit the prosecution witness' "place of residence." The Court held that exclusion of such preliminary lines of inquiry denied the accused entire areas of cross-examination which clearly and directly bore on credibility. In *Greene* v. *McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959), a civil suit seeking a declaration on the validity of a Government revocation of a security clearance (and other appropriate equitable relief), the Court considered the constitutional sufficiency of an established administrative procedure which provided for none of the traditional protections of confrontation and cross-examination. The Court ruled, that absent explicit Executive or Congressional authorization, the Agency was not empowered to deprive the plaintiff of his employment in a proceeding which afforded absolutely *no* safeguards of confrontation and opportunity to conduct cross-examination. No such injustices, even remotely comparable to those in *Alford* and *Greene*, were imposed on appellee in the instant case.

Similarly, in *Douglas* v. *Alabama*, *supra*, the Sixth Amendment deprivation was predicated upon the defend-

ant's *complete inability to cross-examine* (reading of an accomplice's confession) and, in *Pointer* v. *Texas*, *supra*, upon the State's use at trial of a transcript of the identifying witness' testimony during a preliminary hearing (the witness had left the jurisdiction by the time of trial). In *Smith* v. *Illinois*, *supra*, it was held to be a denial of the right of confrontation to sustain objections to questions seeking the name and addresses of the principal prosecution witness. Such extreme limitations on proper cross-examination clearly and understandably result in infringements upon basic constitutional rights; however, to unnecessarily expand and misapply the constitutional dictates of these precedents results in an equally unjustifiable infringement on the necessary and traditional discretion vested in the trial court to determine the permissible scope of cross-examination.

In addition to the teachings of the Supreme Court cases, this Court, in *United States* v. *Finkelstein*, *supra*, has had occasion to evaluate a *Davis* claim very similar to the one presented here (witness' improper motive stemming from Government's promise not to prosecute in exchange for witness' testimony). Although the federal trial judge had repeatedly sustained the Government's objections to the defendant's attempts to examine the prosecution witness concerning the existence of Government promises, this Court affirmed the conviction and distinguished *Davis* stating:

> In *Davis*, the witness probationary status suggested a possibility that he conferred with the police prior to taking the stand. *The witness' denial of such conversations appeared to be of questionable truthfulness*, and *serious* damage to the prosecution's case would have been a *real* possibility if further cross-examination had been permitted. (Emphasis Added). *United States* v. *Finkelstein*, *supra* at p. 529.

In this case, there was absolutely no basis for reasonably concluding that Miller's testimony was probably perjurious. Furthermore, based on Miller's answers to the questions propounded during the "dry-run", it is apparent that no *serious* damage would have resulted to the State's case even had the trial judge seem fit to have allowed the cross-examination to continue ad infinitum.

Appellee contends, and the Court below held, that continued cross-examination of Miller would have established that he "was vulnerable to pressure from the police and prosecutors" and was forced "to alter or color his testimony." Such contention overlooks the peculiar nature of Miller's testimony which, in itself, rendered the testimony manifestly reliable. This witness testified that in February of 1969 he furnished the police with information concerning the repair he had made in 1967 to the set in appellee's home. He described for the police all the details of the repair: the removal of the metal cover from the metal box that housed the sound coil, the soldering of the wire on the sound coil, the taping of the wire, the re-soldering of the metal cover to the box. (A. 123-127). A few months later, when the police recovered the set a few miles from appellee's home, Miller testified he was present when the set was examined; the police removed the metal cover to the box and found exactly what Miller had stated they would find; the re-soldered metal cover, the black tape, and the soldered wire. (A. 126-127). This evidence, by its own nature, was extremely reliable; regardless of how much additional cross-examination the trial judge allowed concerning Miller's motive in testifying, it could not have affected the inherent reliability of this important testimony. Thus, unlike the situation in *Davis*, here was absolutely no reason here to believe that Miller had testified untruthfully.

Here, the record reveals that the trial judge permitted a lengthy and searching cross-examination of Miller. In the exercise of his discretion, the trial judge properly assumed that further cross-examination into the witness' subjective thoughts would not be meaningful considering the inherent reliability of Miller's testimony, and, extent to which his business relationship with Vernale had already been developed. *United States* v. *Bastone*, 526 F.2d 971 (7th Cir. 1975); *United States* v. *Marshall*, 526 F.2d 1349 (9th Cir. 1975). Unlike *United States* v. *Segal*, 534 F.2d 578 (3d Cir. 1967), the trial judge here made no attempt to limit the cross-examination to the very narrow scope of Miller's direct. With reference to the two disallowed questions on other T.V. sets (amount paid Vernale for the two sets, and, existence of invoices covering those purchases), the trial court was the proper one to determine the extent to which cross-examination on such collateral transactions should be permitted; other Circuits have recognized that *Davis* does not mandate unlimited inquiry into all collateral matters claimed to be material on the issue of credibiilty. *United States* v. *Alvarado*, 519 F.2d 1133 (5th Cir. 1975); *Snyder* v. *Coiner, supra; United States* v. *Park*, 525 F.2d 1279 (5th Cir. 1976).

The District Court undertakes to buttress it strained application of *Davis* by seizing on two sentences, taken completely out of context, in the State Attorney's rebuttal summation. (A. 321-322). The Court states that these two isolated sentences establish that the State "unconscionably" capitalized on the defense's claimed inability to demonstrate Miller's involvement during cross-examination. Obviously, an accurate representation of remarks of counsel can only be accomplished when they are quoted in their entirety and analyzed in the context of the entire statement. In his opening summation, the State's Attorney emphasized the inherent quality of Miller's unique

testimony: the accuracy of his prediction: ". . . Ed Miller told us, he said, 'If you ever find the set, this is what you will find.' Long before the set is even found. And lo and behold, that is what we did find, just like he said." (A. 276). A fair reading of the portion of opening summation which dealt with Miller's testimony shows clearly that the State urged the truthfulness of the witness solely on the basis of what he said, *what he predicted would be and was found*, not on the basis that he was a "clean" or "uninvolved" witness. (A. 271-273, 275-276).

Understandably, the defense summation never really dealt with the "accuracy of Mr. Miller's prediction;" rather, his testimony is described as "inconsistent," his recollection was not "always so precise and clear," and his testimony left "questions that would cause you to wonder." (A. 278-284). The defense described Miller as a person who "was focused on as a person who had relevant information, and the State Police went and tried exhaustively to probe his mind to determine what facts were there." (Ex. 10, p. 48). In the face of this characterization of Miller and his testimony, the State's Attorney merely argued the credibility of the witness on rebuttal, in a manner consistent with the opening argument, as follows:

> So, what do we have to do, says the defense, we have got to get at this guy Miller, and they had a hard time doing it. Why shouldn't you believe Miller? I will tell you why you should believe him. He had no axe to grind in this case. What possible motive could Miller have to say *he repaired that chassis in the defendant, Paul Moynahan's home, on a Sunday morning and tell the State Police, ahead of time, exactly what he did before the set was found? And then after the set was found, the State Police uncovered it all and find exactly what Miller said he had done to the set.*

Why does he do a thing like that? Is there some kind of inference in the background here that the Connecticut State Police got him to do it? There has been no evidence of that, not a shred of evidence of that.

Why would a man do a thing like that? *He was interviewed by the State Police before the set was found, and he said, 'Yes, I fixed a set in Moynahan's house,' and he told them what he did. Once the set was found, you know, he had said what he had done, and he looked at it and found his work.*

And I don't know this, but I will bet Mr. Miller wishes that, you know, that the police had never dropped around to his door. You don't think this was pleasant for him. He is not getting any great vicarious thrill out of being exposed to all this in a very intensive cross-examination by Mr. Hennessey. That is not pleasant to do.

He got in it because he was interviewed, but certainly not a shred of an indication of any kind why he would be motivated in some way or another to do harm or damage to the defendant, Paul Moynahan, and yet, don't believe him. And you read over what he said, you read over in the light of your experience, and if you don't agree *that what Edward Miller said made him the most plausible witness to be believed* in the *whole case, simply because, as Mr. Gaffney said, he told us what he did before we had the set and when we took the aluminum can off after we found the set, we found the very work inside that you could not see until the can was off. That was the proof he knew what he was talking about.* (Ex. 10, pp. 93-95).

When the argument of the State's Attorney is examined in its entirety, it can hardly be said that the assertion of

credibility was premised principally on a "clean witness" theory; the italicized portions of the above quote set forth the very essence of the State's Attorney's point regarding Miller. In any event, regardless of how one might choose to interpret the State's Attorney's rebuttal comments, the cross-examination of Miller was not impermissibly restricted in derogation of a federal right.

B. Appellee was not denied a federal right by the trial court's refusal to permit him to call Stevens and Gaspari to testify concerning purchases from Edward Miller

The District held that a denial of the Sixth Amendment right of confrontation also resulted from the trial court's refusal to allow appellee to present the testimony of two persons who, the defense claimed, purchased television sets from Miller which later were discovered to have been stolen:

> . . . while the right to call additional witnesses was not at issue in *Davis*, it does fit into the phrase 'to expose to the jury those facts from which [they] . . . could appropriately draw inferences . . .,' *and the denial of this right was likewise a denial of the six amendment right of confrontation.* (Emphasis added) (A. 322).

As stated previously, Miller testified he had obtained two television sets from Vernale in 1967; one set he had sold to Mr. Stevens and, the other, to Mr. Gaspari. (A. 168-172). Stevens was called to the stand and an offer of proof was made outside the presence of the jury. Counsel stated in the offer: "we can approach the question of Mr. Miller's bias or interest in this case by revealing to the jury that he, himself, was dealing in stolen color T.V.

sets." (A. 301). Counsel also stated that the testimony offered through Stevens would allow the jury "to draw an inference as to Mr. Miller's own connection with stolen color T.V. sets" and that the offer was permissible "to raise the question about the identity of the set that Mr. Miller has testified to." (A. 299-303).

The trial court requested a dry-run outside the presence of the jury and Stevens testified he had purchased a Motorola from Miller in July of 1967 for $549.00 (payment by check). By counsel's own admission the defense was unable to prove through this witness that Miller knew the Motorola set was stolen. The trial court sustained the State's objection and excluded Stevens' testimony before the jury on the ground that it went into collateral matters. (A. 313). The Connecticut Supreme Court rejected appellee's claim of error by the trial judge, stating:

> Counsel for the defendant admitted that the offered evidence would not go to proof that Miller knew the sets were stolen, and therefore the claim that such sales were admissible on the theory of bias cannot be supported. The purpose claimed for the evidence was for negative inferences, that is, if Miller did not know the sets he obtained from Vernale were stolen, such proof would help to undermine the inference that the defendant knew the set he received was stolen. The defendant also claimed the evidence was offered to 'rebut' Bishop's testimony with regard to the size of sets he had stolen. The ruling of the court was correct. 'The trier has wide discretion in ruling on the relevancy of evidence. *State* v. *Towles*, 155 Conn. 516, 523 A. 2d 639, and cases cited. It is a reasonable exercise of judicial discretion to exclude questions which would introduce issues foreign to the case; *State* v. *Dortch*, 139 Conn. 317, 325, 93 A. 2d 490; or evidence the relevancy of which appears

> to be so slight and inconsequential that to admit it would distract attention which should be concentrated on vital issues of the case. *State* v. *Bassett*, 151 Conn. 547, 551, 200 A. 2d 473.' *State* v. *Mahmood*, 158 Conn. 536, 540, 265 A. 2d 83. *State* v. *Moynahan*, 164 Conn. 560, 589 (1973).

While it is clear that a party may undertake to establish bias and interest through testimony of other witnesses, appellant seriously questions whether that evidentiary right falls within the constitutional ambit of the Sixth Amendment. As the District Court conceded, *Davis* dealt solely with the right to cross-examine witness, the very essence of the constitutional concept of confrontation, and *not* with the right to offer extrinsic evidence to impeach a witness.

Appellant asserts that the District Court's reliance on *Johnson* v. *Brewer*, 521 F.2d 556 (8th Cir. 1975) is misplaced. In that case, the Eighth Circuit also recognized that in *Davis* the right to call additional witnesses was not in issue; the court cited *Davis* for the obvious proposition that revelation of a witness' motivation in testifying is part of the constitutionally protected right to cross-examine, and, that a witness' former "partiality of mind" may serve as a basis for an argument that the same state of mind exists and affects present testimony. *Johnson* v. *Brewer*, *supra*, at p. 561.

In *Johnson*, the trial court excluded testimony by defense witnesses which would have established that the *only* State witness, in circumstances precisely parallel (non-police State witness purchased narcotics from defendant), framed another defendant (in another jurisdiction). Johnson was convicted, the conviction was affirmed by the Iowa Supreme Court, and, when the

federal habeas was filed, the petition was dismissed by the District Court. The Eighth Circuit reversed, stating

> The exclusion of the testimony [by the state trial judge] proffered [through defense witnesses] as to the attempt by the informant-witness to frame another defendant in a precisely parallel case went beyond a mere error. What is actually asserted is governmental conduct which, if true, is both inexplicable, *and violative of due process.* (Emphasis Added). *Johnson* v. *Brewer, supra* at p. 562.

Thus, the Eighth Circuit Court of Appeals, curiously, viewed the evidentiary ruling of the state court excluding the extrinsic testimony as so fundamentally unfair (in the circumstances of the case) as to constitute a denial of due process. Here, it can hardly be said that as a matter of constitutional principal, the exclusion of extrinsic evidence of collateral incidents (the Stevens and Gaspari sets) deprived appellee of a fundamentally unfair trial. Routine evidentiary rulings and issues of interpretation of state law seldom rise to due process proportions entitled to review on federal habeas. *Cage* v. *Auger*, 514 F.2d 1231 (8th Cir. 1975); *Schaefer* v. *Leone*, 443 F.2d 182 (2d Cir. 1971); *Gemmel* v. *Buchkoe*, 358 F.2d 338 (6th Cir. 1966).

C. Appellee intentionally and voluntarily abandoned that line of inquiry he now asserts he was not permitted to develop in his cross-examination of Edward Miller

While appellant contends that this record precludes any reasonable conclusion that the constitution dictate of *Davis* was violated, it is also contended, in the alternative, that appellee understandably *abandoned* that area of

questioning he now claims was impermissibly restricted. The Connecticut Supreme Court concluded: "The line of inquiry which the defendant claims he was not allowed to follow was intentionally abandoned after Miller had been questioned in the absence of the jury, and therefore the claim that cross-examination was unduly restricted is utterly without merit." *State* v. *Moynahan*, *supra* at p. 588.

As stated above, the trial court overruled the State's objection to practically all of the questions propounded on the dry-run (all but three). After both counsel objected to a reading of those questions (when the State's objections had been overruled) and answers to the jury, the defense attorney stated: "*I won't go into this line of inquiry at all;*" the trial judge responded: "Then that solves the whole problem." (A. 225).

On this record, the District Court concluded: "I find it clear . . . that, having been denied the opportunity to develop the theory of bias due to criminal involvement, the defendant chose to rest on his offer of proof rather than submit the individual *preliminary* questions which had been allowed to the jury." (Emphasis added). (A. 325).

A review of the record reveals that the questions allowed were far more than mere "preliminary" questions; in fact, they were all of the questions propounded by appellee in the dry-run except three. (A. 214-226). The District Court opinion ignores the great lattitude allowed in the cross-examination of Miller before the jury was excused, and, the fact that during the dry-run, the trial judge directed Miller to answer almost every question. Obviously, to render the inquiry efficacious as to the issue of Miller's motive or bias, the proof had to be brought before the jury. More obviously, appellee's intentional and professionally sound decision not to place

the proof before the jury was quite understandably prompted by the answers given by Miller to the questions. (A. 214-226).

Thus, the record before the District Court certainly provided ample basis for the Connecticut Supreme Court's determination of abandonment; accordingly, the Connecticut court's determination should have been extended the presumption of correctness by the federal habeas court. 28 United States Code, Sec. 2254(d)(8).

D. *Davis v. Alaska* should not be applied retrospectively

Appellee's conviction became final when it was affirmed by the Connecticut Supreme Court on April 5, 1973. The petition for federal habeas relief was filed in the United States District Court on November 5, 1973. The United States Supreme Court decided *Davis* v. *Alaska, supra*, February 27, 1974.

In *Stovall* v. *Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967), the Supreme Court stated: The retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based;" rather, the guiding criteria are: (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard.

In determining whether Supreme Court proclamations of constitutional principle are to be given retrospective application, that Court has also stated: "Where the major purpose of new constitutional doctrine is to overcome an

aspect of the truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule should be given complete retroactive effect." *Williams* v. *United States*, 401 U.S. 646, 653, 91 S. Ct. 1148, 28 L. Ed. 2d 388 (1971). However, in *Stovall*, the Court declined to give retroactive effect to *United States* v. *Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), and, *Gilbert* v. *California*, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967), although the Sixth Amendment principle expounded in those cases was "aimed at avoiding unfairness of the trial by enhancing the reliability of the fact-finding process in the area of identification evidence." *Stovall* v. *Denno*, 388 U.S. *supra* at p. 298.

The Supreme Court, of course, has decreed solely prospective application for a number of its recently established Fourth and Fifth Amendment principles: *Linkletter* v. *Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965) [holding that the exclusionary rule of *Mapp* v. *Ohio* did not operate retrospectively on cases finally decided prior to the *Mapp* case]; *Williams* v. *United States*, *supra*, [holding that the *Chimel* rule was not to be retroactively applied to searches conducted prior to that decision of the Supreme Court]; *Desist* v. *United States*, 394 U.S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969) [holding the exclusionary rule of *Katz*—fruits of an electronic surveillance which was not judicially authorized—not to be retroactive]; *Johnson* v. *New Jersey*, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966) [holding that *Escobedo* and *Miranda* were applicable only to those cases in which trial began after the decisions were announced]; *Mackey* v. *United States*, 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1971) [the *Marchetti* and *Grosso* cases—Fifth Amendment privilege against self-incrimination constitutes valid defense to

prosecution for failure to register as gambler—are to be applied only prospectively]. Perhaps most significant are: *DeStefano* v. *Woods*, 392 U.S. 631, 88 S. Ct. 2093, 20 L. Ed. 2d 1308 (1968) [holding that the Due Process right to a jury trial in all state cases which, were they to be tried in a federal court, would come within the Sixth Amendment's guaranty of trial by jury, was entitled to prospective application only], and *Tehan* v. *Shott*, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966) [holding that *Griffin* v. *California*—abridgement of Fifth Amendment for prosecutor to comment on defendant's failure to testify—was not to be applied retrospectively to those cases where the judgment of conviction had become final].

Retrospective application of recent constitutional mandate has been decreed where the new principle relates directly "to the fairness of the trial—the very integrity of the fact-finding process" *Linkletter* v. *Walker*, 381 U.S. *supra* at p. 639. Such circumstances have included: denial of right of appeal to an indigent, *Griffin* v. *Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956); denial of right of accused to have the assistance of counsel in criminal prosecutions, *Gideon* v. *Wainright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); absence of a state procedure providing for a fair determination regarding the voluntariness of a confession, *Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

While recognizing that any Supreme Court decision dealing with matters related to cross-examination of witnesses can be said to concern possible "impediment of the truth-finding function", and may place in question the accuracy of previous guilty verdicts, appellant nevertheless contends that *Davis* should not have been given retrospective application by the District Court. Extended to

its very broadest interpretation (as in the District Court's Memorandum of Opinion), *Davis* v. *Alaska* gives rise to a constitutional issue any time there is *any* restriction of cross-examination of a prosecution witness in the area of bias, interest, motive, etc. To the extent that this very broad interpretation of the Disitrict Court is correct, *Davis* represents a new rule of constitutional law which abrogates the heretofore relied upon principle of trial court discretion. Undoubtedly, the issue will now be raised on federal habeas whenever a state trial judge limits inquiry into any collateral matters which imaginative counsel can somehow tie into a claim of witness bias, motive, etc. Such will result in an additional burden on the District Courts and present an unnecessary and undesirable threat of greatly increased federal review of *evidentiary rulings* by state judges. Cf. *Schaefer* v. *Leone*, *supra* at p. 185.

To the extent that *Davis* is interpreted less narrowly, it also represents a new constitutional rule: that the accused has a constitutional right to cross-examine a prosecution witness concerning a juvenile record to establish bias, etc. Understandably, many state courts, prior hereto, have assumed that the confidentiality requirements of state legislation affected the permissible area of proper inquiry in state criminal trials.

Accordingly, applying the three-pronged test of *Stovall*, appellant urges that the rule of *Davis* should not be applied to the instant case which was tried several years before that Supreme Court decision. First, the purpose to be served by the *Davis* rule: presumably, its purpose is to assure fairness in the trial proceeding by minimizing the probability of perjury where a witness denies any special interest, motive, etc. and state legislation prevents the defense from inquiring into relevant matters clearly indicative of such bias and improper

motive. While this purpose is certainly aimed at enhancing the reliability of the fact-finding process, certainly the danger involved would seem no greater than the dreadful miscarriage of justice which might result from a mistaken eye witness identification. One might also question whether the risk is as great, or as far-reaching, as the effect of the prospective application of *Griffin* v. *California*: lawyers can only speculate on the number of guilty verdicts returned solely on the basis of defendants' failure or inability to take the stand. Yet, both *Stovall* and *Tehan* provided for only prospective application of these respective constitutional holdings.

Secondly, *Stovall* mentions the extent of reliance by law-enforcement authorities on the old standards. Giving *Davis* its broadest interpretations, state prosecutors understandably have called upon trial judges to reasonably limit cross-examination of prosecution witnesses on collateral matters, relying on the abuse of discretion rule. Obviously, the State has a legitimate interest in not litigating, during criminal trials, numerous transactions which are collateral to the subject matter of the criminal charge. As stated above, the holding in *Davis* (the very broad interpretation of the District Court) certainly goes far beyond prior cases under the *Confrontation Clause*: *Alford*, *Greene*, *Douglas*, and *Smith* v. *Illinois*, *supra*. Giving *Davis* a narrower interpretation, prosecutors have justifiably relied on legislative mandates of confidentiality in properly undertaking to restrict cross-examination in accordance with existing state statutes; only *after* the Supreme Court has defined the constitutional *abridgement* in this regard, should the prosecution be held accountable.

Thirdly, *Stovall* refers to the effect of retroactive application of the new standard on the administration of justice. In *Tehan*, the Supreme Court declined to give the "no comment" rule of *Griffin* retroactive effect commenting that it would have serious impact on the six

states which allowed prosecutorial comment on an accused's failure to testify. In *Stovall*, the Court stated that the *Griffin* impact was "insignificant" compared to what might be expected from a retroactive application of the rules of *Gilbert* and *Wade*. Accepting the District Court's expansive interpretation of *Davis*, a similar result is foreseeable if this decision is applied retrospectively. As stated, federal habeas relief will be available, *as here*, any time there is, or has been, any evidentiary ruling by a state court which has limited cross-examination in the face of a claim of witness bias, special interest, or motive. In this Circuit, the District Courts will be required to review practically all such evidentiary rulings made by state courts where the State's objections have been sustained; in numerous instances, if the District Court's interpretation is correct, federal writs will issue, and new trials will be required; the disruptive effect, as well as the additional burden on both state and federal courts, was detailed in *Stovall* v. *Denno*, 338 U.S. *supra* at pp. 299-301. It is respectfully asserted that this was neither the meaning nor the intention of the Supreme Court's decision in *Davis*.

POINT II

The District Court erred in holding that the State Trial Court violated *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny by failing to disclose to the defense information indicating, according to the court, that the police were at one time considering arresting a witness.

Judge Blumenfeld held that several comments made by the police in the course of the questioning of Edward Miller suggested that Miller had been, at least at one time, a potential target of prosecution. The comments occurred in portions of the statements which were not

turned over to the defense. Also, as recognized by Judge Blumenfeld, there had been no specific request for any such statements prior to trial. (A. 326).

While extensive discussion of the testimony of Edward Miller has occurred with reference to the *Davis* claim, some brief repetition may be necessary. In the course of his testimony, he said that he had repaired a color television set at the home of the defendant and that this repair was found on the later recovered smashed set. He had described the repair to the police before the set was found. He mentioned in his direct testimony the fact of his having talked to the police.

At the commencement of cross-examination, the defense moved for production of all of Miller's prior statements. It is unclear from the record precisely what arrangement was agreed on. But soon after the request for production, an extensive argument occurred concerning the proposed scope of cross-examination. This matter was discussed above; suffice it to say here that the defense wished to cross-examine Miller on his claimed criminal involvement and his possible bias as a witness.

Portions of Miller's prior statements were delivered to the defendant and were used by him in the course of his cross-examination. In the context of the identity of the repair, Miller was asked by the defense whether ". . . the State Police made inquiry of you with respect to this transaction?" (A. 176). The answer was affirmative. The statements were used in an effort to discredit Miller's recollection that the repair was made at the defendant's home. (A. 177). Some initial difficulty in remembering the make of the set was brought out by the defense through the use of the statements. (A. 182-183). Very shortly thereafter the statements were used to tie Miller to Vernale and the jury heard from a reading of the statement, the admonition of one Sgt. Courtney to "[c]ome clean with me on Moynahan." (A. 185-187).

Again using the statements for purposes of cross-examining Miller, the defense elicited that he had told the police that he had sold two sets he had received from Vernale and that at one time he stated and later retracted that he had sold a third set to a Mrs. MacIntosh. (A. 194-195). The statements of February 17 and February 18 were admitted into evidence as prior inconsistent statements. (A. 209-212, 213). The colloquy concerning the permissible scope of further cross-examination, as related in the discussion of the *Davis* claim, then occurred. No useful purpose would be served at this point to repeat that discussion.

Judge Blumenfeld held, however, that even though substantial portions of the Miller statement were delivered to and used by the defendant at the trial, the state withheld exculpatory evidence concerning the possibility of bias or motive on the part of Miller. The court held that the defendant already knew of Miller's "criminal involvement" and thus whatever possibly exculpatory information which was not disclosed, was not material under *United States* v. *Agurs*, — U.S. —, 96 S. Ct. 2392 (1976). (A. 327). While the appellant agrees with the latter holding, consideration of Miller's criminal involvement would seem to have a bearing as well on bias or motive. For if Miller were involved in a criminal scheme, if the police knew of such involvement, and if Miller knew the police knew, then, arguably, bias or motive to shade testimony away from his own possible guilt and toward that of the state's so-called "target" may have existed. But knowledge by the defendant of Miller's purported criminal activity almost implies by itself knowledge of possible motive or bias.

As noted above, a pretrial motion was filed requesting production and inspection. It specifically requested the prior statements and testimony of several named indivi-

duals as well as generally exculpable material. Edward Miller was not among the named individuals. (Exhibit 2, pp. 10-12). At the pretrial argument concerning the scope of discovery, there once again was no mention of Edward Miller. The Superior Court took the stance that the state should disclose all exculpatory evidence in its possession. (Exhibit 9, pp. 40-41).

After the direct examination of Miller, the defendant, as noted above, requested all statements and testimony of the witness. The resulting order does not appear in the record. The state court finding which appears in the record before the Connecticut Supreme Court states that the court refused to make an in camera inspection of prior testimony, but ordered the state to turn over any matter which might be of assistance to the accused. (Exhibit 2, p. 102). The order in the record pertaining to Vernale's prior statements required disclosure of all material relating to the defendant; the court later modified the order to include "evidence in (the state's) exclusive possession which is not merely cumulative or embellishing and which may be of material importance to the defense, regardless of whether it relates to testimony given at the trial." (Exhibit 3, pp. 824-25, 834). The Vernale order would appear to be a hybrid order embracing both *Jencks* material and *Brady* material. While the order relating to Vernale is obviously not dispositive of the order pertaining to Miller, it may shed some light on the thinking of the trial court.

In any event, an examination of Edward Miller's statements of February 17, 18 and 21, 1969, and of his grand jury testimony contained in Exhibits 23 and 24 (A. 3-107) clearly shows the rationale on which portions were selected for disclosure. In general, the material relating to the Moynahan transaction was disclosed and extraneous material was not disclosed.

The precise information which was held by Judge Blumenfeld to be improperly withheld was that the police were "looking at" Miller but had not pressed charges, and therefore there was a connection between Miller's testimony and his personal freedom. (Document No. 15, p. 17; A. 332). An examination of what the defense knew in comparison to what it did not know is, then, appropriate.

On February 17, 1969, Miller gave his first statement to the police. (Exhibits 23, 24; A. 3-12). On February 18, the police returned; statements in this interview were deemed exculpatory. Given to the defendant were statements indicating that Vernale may have "indirectly" recommended Miller for repair work. (Exhibit 23; A. 3-5, 13-14).

The segment of the interview which provides the context for the crucial statements is printed in the Appendix. (Exhibit 24, pp. 38-52; A. 42-61). The police were trying to discover information concerning stolen television sets. On the previous day Miller had told them that he had sold two sets that he had received from Vernale. The police were obviously trying to develop information about other sets. They told Miller that they were looking for the truth (Exhibit 24, p. 38; A. 47), that they already knew that he had handled two sets that were stolen (Exhibit 24, p. 39; A. 48), and they thought he may have handled more. They said they were going to find out the truth with or without Miller's help, but they preferred his help (Exhibit 24, p. 48; A. 57). Significantly, Miller stuck to the same story he had told the day before and would repeat again: he had received only two sets from Vernale. Thus, he told the same story regardless of the pressure applied.

An examination of the statement of Edward Miller on February 21, 1969, is perhaps even more revealing. The

police more or less accused Miller of selling two more sets, but Miller adhered to his original statement. (Exhibit 23, pp. 2-22; A. 65-85). This statement was disclosed to the defendant. Not given to the defendant were suggestions that other people were trying to "set up" Miller and that Miller stopped associating with Vernale after he learned about his reputation. (Exhibit 24, pp. 22, 29; A. 88-95).

In his closing argument to the jury, the defendant said about Miller, "Apparently he was focused on as a person who had relevant information, and the State Police went and tried exhaustively to probe his mind to determine what facts there were." (A. 279). Further, "[W]hen you weigh Mr. Miller's testimony, you weigh it like any other witness . . . He bought two sets from Mr. Vernale, himself. You will have the books of Miller & Fellin, his company . . . [H]e didn't even keep track of the money he received because he thought it was tips . . . Well, look through the books and see if you can find the sale to Stevens or a sale to Gaspari by Miller & Fellin . . ." (A. 281-282).

In this state of affairs, the District Court held that the "withholding" of evidence indicating that Miller was a possible target of prosecution prevented a meaningful avenue of cross-examination.

The most recent Supreme Court case dealing with exculpatory evidence is *United States* v. *Agurs*, — U.S. —, 96 S. Ct. 2392 (1976). Justice Stevens reviewed the three categories of cases covered by *Brady* v. *Maryland*, 373 U.S. 83 (1963). One is the knowing use of perjured testimony. The second is the failure to produce evidence that would be material in the sense that it might affect the outcome of the trial despite a specific request for production. The third situation is that in which no

specific request is made, but the obvious exculpatory nature of the evidence should alert the prosecutor to the duty to disclose. *United States* v. *Agurs*, *supra*, 2398-99.

Judge Blumenfeld apparently held that the "withheld" evidence, i.e., that the police were at one time "taking a look at Ed Miller," fell into the first category. That a prosecutor may not knowingly allow perjured testimony, even as to credibility, is well-established. *Napue* v. *Illinois*, 360 U.S. 264 (1959). Even inadvertent non-disclosure of evidence controverting a witness' statement as to credibility merits a new trial if the evidence is material. *Giglio* v. *United States*, 405 U.S. 150 (1972).

Before *Brady* and *Napue* are even applicable, however, there must be some showing of suppression. "The heart of the holding in *Brady* is the prosecution's suppression of evidence . . ." *Moore* v. *Illinois*, 408 U.S. 786, 794 (1972). "[A]ny allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense." *Giles* v. *Maryland*, 386 U.S. 66, 96 (1967) (Whate, J., concurring). "The purpose of the *Brady* rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him." *United States* v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir. 1973).

It is absolutely clear that the defense was aware of Miller's possible jeopardy. In the course of requesting the prior statement, counsel for the defense said, "We know from our own investigation of three instances where Mr. Miller sold color television sets to individuals in the Waterbury area, Mr. Stevens, Mr. Gaspari, and Mr.

Lanza. It is our understanding as well that one of these gentlemen, at least, was subsequently charged by the State's attorney's Office with the crime of receiving stolen goods, based upon the fact that he did receive a stolen color T.V. set from Mr. Miller. However, to the best of our knowledge, Mr. Miller was not charged, although he, in fact, was the seller . . ." (A. 133-134). A serious contention that the defense had no idea that the police may have said that they may have to take a look at Ed Miller is almost incredible.

Although the defense may not have known the precise words used by the police, it is clear that they knew Miller's situation. They knew that Miller had been interrogated three times by the police and again in the grand jury. They knew and developed in cross-examination that Miller had received two television sets from Vernale, and that at least one of the recipients of the sets had been arrested for receiving stolen goods. "This is not to say that convictions ought to be reserved on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court . . ." *Giles* v. *Maryland, supra*, 98 (Fortas, J., concurring).

Not only is it clear that the defense knew the gist of the "suppressed" evidence (not only through their own investigation but also through the portions of the statements given them as related above), but, the premise upon which the court's ruling was based is also questionable. The *Napue* line of cases is relevant only where there is false testimony. The testimony here which the court thought false was Miller's saying, generally, that he didn't feel threatened. In context, as related above, the police were trying to get Miller to tell them everything he knew about any sales of stolen television sets. He had immediately told them about two sets that he had

received from Vernale and had sold, but he said he didn't think they were stolen. He consistently denied that there were more than two sets. He may well not have felt threatened, as he had already told the police what he knew and a "look" at Ed Miller would be acceptable. The "suppressed" evidence does not directly contradict any statement, contrary to the evidence in *Napue* and *Giglio*.

Even if, however, the testimony was false and the "suppressed" evidence was more than cumulative, the further criterion which must be met for a new trial is the materiality of the evidence. In *United States* v. *Agurs, supra*, the traditional balancing between the good or bad faith of the prosecutor and the materiality of the evidence was rejected. Cf. *United States* v. *Keough*, 391 F.2d 138 (1968). Instead, the sole issue to be considered is the character of the evidence. *United States* v. *Agurs, supra*, 2400. Materiality in the *Brady* context may be deemed to be the affect that the evidence would have had if it had been disclosed. "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record." *United States* v. *Agurs, supra*, 2401-02.

The impact that the addition of the precise words used by the police at one point during one interview would have had on the jury verdict is necessarily somewhat speculative. The jury of course knew that, at least in one sense, the police were looking at Ed Miller: three interviews and a grand jury appearance constitute more than casual interest. The jury knew that Miller had sold at least two other sets which he had obtained from Vernale, and that the police had questioned him rather closely about those sets. They knew that there was some

association between Miller and Vernale. They knew that the police had advised Miller to "come clean" with them on Moynahan. They knew that the sales of the two sets had not been recorded.

The factual situation is thus highly analogous to that of *Agurs* itself. In *Agurs*, information that the victim of a homicide had a record for assaults, seemingly with knives, was not made known to the defendant. But apparently evidence of the aggressive nature of the victim was known by the jury, particularly in that shortly before the crime the victim was armed with two knives. *United States* v. *Agurs*, *supra*, 2402.

Since the jury in the instant case knew of Miller's possible criminal involvement and of the tenor of his examination by the police, the addition of the "withheld" testimony would not seem in any way to be able to create any reasonable doubt not otherwise entertained. See also *United States* v. *Brawer*, 367 F. Supp. 156, 170, 172 (S.D.N.Y. 1973), *aff'd*, 496 F.2d 703 (2d Cir. 1974); *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13 (2d Cir. 1969).

> The jury had all the facts essential for a fair appraisal of Maucelli's testimony before them. The Court is satisfied that, in light of all the evidence, (citations omitted) and in the context of the entire trial, (citations omitted) the undisclosed statements would not have enabled the defendants to so present their case that they would probably create a reasonable doubt as to their guilt in the mind of a conscientious juror. The probability that disclosure of the statements to the defense would have altered the result is zero. Defendants received a fundamentally fair trial. 'The pans contain weights and counter-

weights other than the interest in a perfect trial.' United States v. Keough, *supra*, 391 F.2d at 147, quoting Kyle v. United States, 297 F.2d 507 (2d Cir. 1961). *United States* v. *Brawer*, *supra*, at 367 F. Supp. 177.

POINT III

The District Court erred in holding that the State Trial Court denied appellee his right to confrontation by allowing a witness to take the stand who reportedly might take the Fifth Amendment and who in fact did.

It, perhaps, should first be stated that Judge Blumenfeld has left unclear whether the facts underlying this claim constituted error sufficient to merit habeas corpus relief. It would appear that the court below granted the writ on the basis of the Appellee's Right to Confrontation and *Brady* claims and never came to a final decision regarding the *Namet* issue. (A. 339).

The facts underlying the appellee's claim are as follows: when the State announced its intention to call Vernale, a longtime acquaintance and friend of the appellee, the attorney for the appellee announced that since the witness was then facing charges arising out of the same transaction, it was his belief that Vernale would refuse to testify by invoking the Fifth Amendment. On the basis of this belief, appellee objected to the examination of Vernale before the jury without first having a dry-run to determine what the witness's intentions were. The Court overruled the objection and motion for a dry-run. (Exhibit 3, pp. 805-809; A. 247-249).

The following facts pertaining to the State's calling of Vernale should be noted: While Vernale was repre-

sented during the proceeding by a court-appointed attorney, the attorney's only statement of record regarding Vernale's testifying concerned his physical ability to take the stand. (A. 254). There is no record of either the Court or the State being informed of Vernale's intentions regarding the Fifth Amendment. Additionally, it was the State's representation that it had no notice of Vernale's intent to refuse to testify. (A. 253). Indeed, it was the State's understanding that, on several occasions, Vernale had knowingly waived his Fifth Amendment rights and had testified under oath. (A. 246-247; Exhibits 23 and 24).

On direct examination of Vernale, after several preliminary questions, in answer to each of which Vernale answered that he and appellant were friends, the following occurred:

> Q. And tell the ladies and gentlemen of the jury something about your friendship. What did it involve or entail, for example?
>
> A. I would like to take the Fifth Amendment on that for the simple reason I don't want to incriminate myself in any way. This is not my trial.
>
> Q. All right. Were you ever an informant for Mr. Moynahan?
>
> A. Never. I was never an informer.
>
> Q. Did you ever give him any information of any kind concerning criminal activities?
>
> A. I take the Fifth Amendment on that. I don't want to incriminate myself in any way, also.
>
> Q. Did you ever make a gift of a television set, a color television set, to Mr. Moynahan?
>
> A. I take the Fifth Amendment on that. I don't want to incriminate myself. (A. 260-261).

The State asked no further questions of the witness. On cross-examination, Vernale testified to his relationship with the appellant until the questioning reached the subject of television sets at which time he once again took the Fifth Amendment. Cross-examination then ceased and the witness was excused (A. 262-270).

The State brought up the fact of Vernale's refusing to testify, only at one other point, in the trial. In rebuttal argument, in response to the defendant's attacks on the credibility of the State's witnesses, the prosecution stated briefly:

> And Charles Vernale, who was asked, 'Did you give the defendant, Paul Moynahan, a color television set? Did you deliver it to him?' And he took the Fifth Amendment. He is not a very great guy. (A. 289).

At no point did the State argue or request that any inference should be drawn against the appellee as a result of Vernale's refusal to testify.

Finally, the Court, in its charge to the jury, after repeating the questions which underlie appellee's claim here, gave the following curative instruction to the jury:

> Under our Constitution Mr. Charles Vernale had the right to refuse to answer those questions on the ground of self-incrimination. [C]onsequently, you are now instructed that no inferences should be drawn by you as to what the answers might have been. And, of course, you are not to draw any adverse inferences against Mr. Paul Moynahan by reason of the fact that Charles Vernale refused to answer the questions on Constitutional grounds or, for that matter, on any other grounds. (A. 294).

The leading case on the issue of the propriety of a prosecutor's calling a witness and thereby compelling him to invoke the Fifth Amendment in the presence of the jury is *Namet* v. *United States*, 373 U.S. 179 (1963). That case, together with the more recent Supreme Court cases of *Douglas* v. *Alabama*, 380 U.S. 415 (1965) and *Frazier* v. *Cupp*, 394 U.S. 731 (1969), sets out the general rule that the practice of compelling a witness to invoke his Fifth Amendment rights can require reversal in two circumstances (a) when it amounts to *prosecutorial misconduct;* for example where the prosecutor, having full knowledge of the witness' intentions, calls him to the stand simply to put the claim of privilege, with its attendant inference against the defendants, before the jury; and (b) where, regardless of prosecutorial misconduct, the claim of privilege has added *critical weight* to the state's case by putting inferential matter before the jury which the defense had no way of cross-examining.

While the appellant does not challenge the rule enunciated in the *Namet* line of decisions, it is respectfully urged that an application of the rule to the facts of the instant case, particularly as it has been developed in the Circuits, will show that no reversible error is made out by the testimony of Charles Vernale and the circumstances surrounding such testimony. As stated in *Namet*, *supra* at 186:

> None of the several decisions dealing with this question suggests that reversible error is invariably committed wherever a witness claims his privilege not to answer. Rather the lower courts have looked to the surrounding circumstances in each case.

A. Prosecutorial misconduct

While it has been stated that the good or bad faith of the prosecutor is not controlling in a *Namet* claim, *Frazier* v. *Cupp*, *supra*, 736, nevertheless the record here precludes any claim of prosecutorial misconduct. In determining whether misconduct has been established, the courts have considered several factors: the prosecutor's improper intent in calling the witness; his advance knowledge of the witness' intentions; whether the prosecutor continued to examine the witness at length once the privilege had been claimed; whether any reference to the testimony was made in closing argument. A review of the cases indicates that only where a combination of at least two of the above factors exists, has misconduct been found.

The State here had a bona fide purpose in calling Vernale to testify. On the one hand, its failure to do so could have given rise to an unfavorable inference resulting from a missing witness charge. *Queen* v. *Gagliola*, 162 Conn. 164, 168 (1972). On the other hand, the witness had given statements under oath three times previously, once to a grand jury and twice to the police and had never before refused to testify. There was certainly no reason to suspect that he had changed his mind about testifying; the only indication thereof was the appellee's stated belief that Vernale would invoke the Fifth Amendment. But the prosecuting authority can't be required to "accept at face value every asserted claim of privilege." *Namet* v. *United States*, *supra*, 188. Here there can be no question but that the State, in good faith, expected Vernale to testify. Consequently, the State's calling of the witness cannot be deemed prosecutorial misconduct. *Frazier* v. *Cupp*, *supra*, 736-737.

While the manner in which the State examines the witness may also constitute prosecutorial misconduct, a

review of the cases shows that such a finding has been made only where the prosecution has grossly overreached all sense of propriety. Surely the asking of but three questions as in the instant case does not amount to the degree of abuse found in such cases as in *Douglas* v. *Alabama*, *supra* (an entire confession read in with the witness, after every few sentences, refusing to answer the prosecutor's question as to whether he made the statement embodied in those sentences); or *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1963) (prosecutor asking a series of eighteen questions and witness pleading the Fifth Amendment to each); or *United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959), (prosecution calling, in series, three witnesses all of whom refused to testify and having advance knowledge of the intentions of the first two). The present case must be considered among those cases where examination had ceased almost immediately upon the witness' asserting his Fifth Amendment rights. See: *Frazier* v. *Cupp*, *supra*, 734; *Gerberding* v. *United States*, 471 F.2d 55 (8th Cir. 1973); and *Cota* v. *Eyman*, 453 F.2d 691 (9th Cir. 1971).

The final factor that may contribute to a finding of prosecutorial misconduct is where the prosecution, in closing argument, directs the jury's attention to the witness' claim of privilege. In the instant case, the State in rebuttal argument, made mention of Vernale's refusal to testify but did so only briefly and made no effort to have the jury draw any inference from the fact. A further review of the cases will show that, while prosecutorial misconduct has been found where the State commented on a witness' claim of privilege, there have always been additional factors contributing to the finding; see *Cain* v. *Cupp*, 442 F.2d 356 (9th Cir. 1971) (the prosecutor had been informed by the witness' attorney of his client's intentions and in its closing statement asked that the jury draw an unfavorable inference); *United States*

v. *Maloney*, *supra* (where the State had forced three separate witnesses to claim their intentions); *United States* v. *Coppola*, *supra* (where the prosecutor's comments in summation were combined with clear abuse during examination). In the instant case, all we have is the State's brief comment in rebuttal summation which, it should be added, was made subject to a curative instruction in the Court's charge.

In sum, the only actual transgression committed by the prosecutor was the brief comment in final argument. Vernale was called to the stand for proper reasons and without any advance knowledge by the prosecution of his intention to refuse to testify. Once the witness claimed his privilege, questioning stopped almost immediately. Certainly this one prosecutorial error without other aggravating factors cannot be deemed misconduct sufficient to warrant a federal writ of habeas corpus.

B. Critical weight

The second issue is whether this action has added "critical weight" to the case against the defendant. *Namet* v. *United States*, *supra*; *United States* v. *King*, 461 F.2d 53 (8th Cir. 1972); *Cota* v. *Eyman*, *supra*; *United States* v. *Maloney*, *supra*. The risk here is that the witness' refusal to testify regarding transactions in which he was allegedly involved with the defendant may be taken to be evidentiary and, is of course, not subject to cross-examination, *United States* v. *Maloney*, *supra*, p. 537. This is considered to be particularly harmful where, in an otherwise close case, "the witness refusal to testify is the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant." *Namet* v. *United States*, *supra*, p. 189; *United States* v. *Maloney*, *supra*; *Cota* v. *Eyman*, *supra*.

In determining whether critical weight has been added to the prosecution's case the courts have looked to the surrounding circumstances of each case; *Namet*, *supra*, p. 185, considering a number of factors: the strength of the overall case without the claim of privilege; whether there was other evidence implicating the defendant with the witness; the extent to which the claim of privilege was placed before the jury; and whether the trial court gave any curative instructions to the jury.

In the present case, as the record demonstrates, there was plentiful evidence tending to prove that the defendant committed the crime charged, including testimony from two witnesses (John Bishop and Edward Miller) connecting Vernale and the defendant in the transactions that constituted the crime. The prosecution asked Vernale but three questions to which he invoked his privilege and mentioned the refusal to testify only briefly in final argument of what had been a long and complicated trial. The Court gave the jury a curative instruction and, while the judge preceded it with a repetition of Vernale's testimony, that instruction would have been worthless unless the evidence to which it applied had been adequately identified.

It is respectfully urged that the foregoing facts do not fall within the line of cases where *critical weight* has been viewed as added to the State's case. See *Douglas* v. *Alabama*, *supra* (confession read before the jury in its entirety was the only evidence that defendant was the actual person who fired the murder weapon); *United States* v. *King*, *supra* (the prosecution examined two witnesses who claimed the privilege to a number of questions and the case against the defendant was determined to be otherwise weak); *United States* v. *Maloney*, *supra* at p. 538, (the court based its decision on the failure of the trial court to follow the "accredited ritual" by giving

a curative instruction). Also *United States* v. *Coppola*, *supra*, where the prosecution read a series of eighteen questions to the witness; the court, at p. 1160, stated:

> [Namet] does not stand for allowing . . . various and sundry questions which are certain to produce a claim of privilege and to give rise to an atmosphere of guilt.

The Court in *Coppola* also stated that a cautionary instruction (which the trial court neglected to give) would have made the problem less aggravated.

The instant case is clearly of a kind with such cases as the following where no finding of critical weight was made: *Namet* v. *United States*, *supra* (the witness had given lengthy non-privileged testimony that implicated the defendant); *Frazier* v. *Cupp*, *supra* (a curative instruction preventing error); *Cota* v. *Eyman*, *supra* (the few questions to which the claim of privilege was invoked were "not the only or chief sources of the inference that the witness had engaged in the crime charged with the defendant"—*supra* at 694—two other witnesses having previously testified to this); *Gerberding* v. *United States*, *supra* (where the Court found in contrast to its decision in *King*, *supra*, that the prosecution had a strong case without any possible inference arising from a claim of privilege).

In sum, as to the issue of whether the testimony of Charles Vernale added "critical weight" to the State's case, a review of the surrounding circumstances shows that the trier of the fact did not give critical weight to the testimony; rather Vernale's claim of privilege was a minor occurrence in a long and complicated trial and any prejudice that the defendant may have incurred was cured by the Court's instruction in the jury charge.

CONCLUSION

The appellant respectfully urges that the rulings of the trial court in no way deprived the appellee of his rights of confrontation or of due process and requests that the decision of the District Court be reversed.

THE APPELLANT, JOHN R. MANSON
By: JOHN F. MULCAHY, JR.
Deputy Chief State's Attorney
ROBERT E. BEACH, JR.
Assistant State's Attorney

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-2122

PAUL MOYNAHAN,
APPELLEE

v.

JOHN MANSON,
APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 15th day of March, 1977, deponent served the within Brief and Joint Appendix upon Edward F. Hennessey and James A Wade, Esqs., Robinson, Robinson & Cole, 799 Main Street, Hartford, Connecticut 06103

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 15th day of March, 197 7

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 197 7